No. 83-581

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IN THE

Supreme Court of the United States

October Term, 1983

HAROLD HAIMOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REPLY BRIEF OF PETITIONER

INTRODUCTION

Petitioner, a Jacksonville attorney, was tried and convicted on charges arising out of the making,

possession, and filing of false statements and documents in connection with an application for an SBA loan and the disposition of the proceeds of that loan. The loan was made at the behest of a client of Haimowitz', Peter Abbott, who sought the monies to finance the purchase and renovation of a Jacksonville restaurant. Peter Abbott, who testified against Haimowitz, was an experienced con artist who had previously acquired several loans, including SBA loans, through fraud. Haimowitz defended on the ground that he had relied on information provided to him by his client and was unaware of any scheme to defraud.

Petitioner raises two issues for this Court's consideration. Petitioner took the stand on his own

behalf and the prosecution then was permitted to call in rebuttal two witnesses who testified about his poor reputation for truthfulness and their negative opinion as to his truthfulness. The trial court then refused to permit Petitioner to call witnesses who would have testified about his good reputation for truthfulness and their opinion that he was truthful. Petitioner maintains this was error under Rule 608 of the Federal Rules of Evidence and deprived him of due process of law.

Second, a search was conducted of Petitioner's law office pursuant to a warrant supported by an FBI agent's affidavit. The affidavit was based almost entirely on information provided by Peter Abbott. The affidavit however failed to mention

facts known to the government which showed that Peter Abbott was a liar and a fraud. Petitioner claims that, under the decisions of this Court, the failure to disclose rendered the search warrant invalid.

ARGUMENT

I. The Solicitor General's argument in support of the trial court's ruling refusing to permit Haimowitz to present witnesses who would have testified about his truthfulness manages to relegate Rule 608 of the Federal Rules of Evidence, upon which Petitioner relies, to a mere parenthesis. The reason is plain. If the existence and plain meaning of Rule 608 are recognized, the error below is manifest. Only by ignoring the rule can the government justify the ruling by resort to

general doctrines about a trial court's "discretion" with regard to "surrebuttal" testimony.

Discretion, of course, can be properly exercised only in context and here Rule 608 provides the context. That rule provides that after a witness' character for truthfulness has been attacked, evidence of his truthful character is admissible.

Surely, where the witness is a criminal defendant, the opportunity to present such evidence is part of the guarantee of due process. While there may be some room for the exercise of a trial court's discretion,[1] any such

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[1] For example, if a defendant has introduced evidence of his good character under Rule 404 in his case in chief, and the government only then introduced rebuttal testimony, perhaps his Rule 608 testimony could be excluded as cumulative.

discretion cannot be properly exercised absent an understanding of the relevant evidentiary rule and the Constitutional base on which it rests. The trial court failed to consider the controlling rule of evidence; the Court of Appeals, affirming, ignored it as well.

Nor can the trial court's ruling be justified on the ground of avoiding delay -- and here the Solicitor General is misleading. No delay whatsoever (except for whatever time it would have taken for the witnesses to testify) would have been occasioned by permitting defendant's witnesses to testify. The government rested at the very end of the day after it had presented its bad reputation witnesses; the jury was then sent home. The witnesses whom Petitioner

sought to call were available and present in the courthouse the following morning when the trial proceedings resumed.

In any event, the reason the trial court refused to permit the defendant to call his witnesses was not delay. Rather, the court was concerned that, because it had announced the close of evidence, the jury might give undue weight to new evidence received. However, a simple instruction to the jury could have alleviated that concern. In a case where the credibility of the defendant and of his accuser was essentially the only issue to be decided, precluding the defendant from presenting evidence of his good character to counter the government's bad character evidence was highly prejudicial.

II. Petitioner argues that a search warrant based on an affidavit premised almost exclusively on information provided by an informant which omits to disclose information known to the government indicating that the informant is not credible is not valid. The Solicitor General denigrates the claim but it is a direct, logical, and necessary extension of the rule of Franks v. Delaware, 438 U.S. 154 (1972). This Court's recognition of that extension is essential if the magistrate's function is not to be transformed into a sham.

Indeed, the Solicitor General does not seriously dispute the validity of the rule urged by Petitioner, but opposes it on the ground that it would be burdensome and

time-consuming.[2] The rule urged by the Petitioner would not impose on the government a time-consuming and burdensome new duty to investigate its informers, only to disclose to the magistrate information it already possesses. Any burden which this might represent to the government would surely be justified by the enhanced reliability of the magistrate's probable cause determination which could truly be

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[2] The government also suggests that disclosure of information bearing upon an informant's credibility "can sometimes endanger the informant or jeopardize an ongoing investigation," (Brief for the United States at 8) but it is not clear what, if anything, the government means, since the warrant and affidavit may of course be sealed under appropriate circumstances.

based on the totality of the circumstances. See Illinois v. Gates, 103 S.Ct. 2317 (1983).[3]

Finally the government suggests that, in any event, the appropriate remedy would be, not the striking of information supplied by the informant, but the inclusion of the omitted information regarding the informant's lack of credibility and, that, considering that omitted information, the affidavit still establishes probable cause. The government's proposed remedy has the surface appeal of consistency with the Franks rule

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[3] The government's suggestion that if Petitioner's rule were adopted police might resort to warrantless searches (Brief of the United States at 8) is a threat not worthy of the government. Surely, many restrictions imposed by the Fourth Amendment are initially viewed as unnecessary and burdensome by law enforcement agents; in operation, they prove to be wholly workable.

but that application of Franks cannot be the law. First, of course, all of the information in the government's possession still has not been disclosed so it is impossible to consider that information in assessing probable cause. More important, though, the remedy proposed by the government would render the rule requiring disclosure meaningless.

We may assume, for present purposes, that on the basis of the information provided to the magistrate, there was probable cause. But the essence of Petitioner's argument is that, had the magistrate been informed that the informant was a professional liar, he would not have credited any of his factual assertions. The government's argument proceeds on the mistaken assumption

that the omitted material is irrelevant to assessing the information which was provided to the magistrate. If that were so, the failure to disclose would never invalidate the warrant and the rule requiring disclosure would be a nullity.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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